No. 89-524

Supreme Court, U.S.
FILED
NOV 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING LTD.,
Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,
and
PIONEER NAVIGATION, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF SAMMILINE COMPANY, LTD. AND HIGHTWORTH SHIPPING LTD.

ROBERT H. MURPHY
KENNETH J. SERVAY *
JOHN H. CLEGG
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Petitioners

November 3, 1989

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-524

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING LTD.,
Petitioners,[1]
v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,
and
PIONEER NAVIGATION, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF SAMMILINE COMPANY, LTD. AND HIGHTWORTH SHIPPING LTD.

PREFACE

Respondents John and Beverly Woods[2] do not challenge the issues as stated in the petition. They do not dispute

---

[1] Petitioners' Rule 28.1 statement is set forth at page ii of their petition. Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Ltd., have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

[2] Respondents John and Beverly Woods are the only parties to file an opposition to this petition. Accordingly, this reply brief addresses only the matters urged by them.

that a serious conflict exists among at least eight circuits concerning the duties that a vessel owner owes to discharging longshoremen with regard to the condition of cargo as stowed by an independent loading stevedore. They do not question that the Fifth Circuit expressly recognized in the decision below that its holding directly conflicts with the Third Circuit's holding in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), concerning interpretation of this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Nor do they challenge the fact that the circuits that have addressed this issue have come to no less than three different interpretations concerning the duty that is owed under *Scindia*. Most importantly, respondents do not deny that a shipowner's liability or non-liability to longshoremen under *Scindia* and Section 5(b) of the Longshore and Harbor Workers' Compensation Act depends on the circuit in which the shipowner is sued. Stated otherwise, Mr. and Mrs. Woods have not challenged the contention that this case presents a question of great importance to the maritime law upon which the circuits seriously disagree.

Rather, aided by the absence of a record before the Court at this early stage of this writ proceeding, Mr. and Mrs. Woods have asserted facts either that are not supported by the record, or that are distortions of the testimony in the record, in an attempt to dissuade this Court from granting a writ. They assert that this petition should be denied because the facts and issues in this case are different from those before the Third Circuit in *Derr*.

Respondents' opposition provides no valid reason for denying this writ. The purported distinguishing facts that respondents assert are not supported by the record and did not form the basis of the Fifth Circuit's decision, which expressly recognized that its holding is in direct conflict with *Derr*.

I. SEVERAL FACTUAL ASSERTIONS MADE BY MR. AND MRS. WOODS ARE NOT SUPPORTED BY THE RECORD AND FORM NO PART OF THE FIFTH CIRCUIT'S JUDGMENT PROVIDING THE BASIS OF THIS WRIT APPLICATION

As they did before the Fifth Circuit, Mr. and Mrs. Woods seek to cloud the issue by making several factual assertions that are not supported by the record. The Fifth Circuit, in reviewing the record in this case, apparently recognized the meritless nature of these factual assertions, as they form no part of that court's decision. Likewise, respondents' factual assertions provide nothing for this Court to consider.

A. The Cargo Plan "Alleyway"

At several pages in their opposition (*e.g.*, pages 2, 4, 10), the respondents assert that the cargo stowage plan indicated that the cargo in the No. 2 hold should have been stowed so as to provide an "alleyway" between the Houston-bound cargo and the New Orleans-bound cargo. Neither the cargo plan nor the testimony supports respondents' assertion. Respondents made this same argument before the Fifth Circuit. The Fifth Circuit chose to ignore it, apparently agreeing that it is not supported by the record. In any event, as discussed below, cargo stowage is not a responsibility of the vessel owner, but is a responsibility of the time charterer and its stevedores.

B. The Vessel Owner's Alleged Responsibility for Cargo Stowage

Mr. and Mrs. Woods also assert throughout their opposition that the vessel owner had authority over where the cargo was stowed, that the vessel owner had the authority to change the stowage plan and the stowage of cargo, and that the vessel owner actually participated in the loading process.

The evidence does indicate that the vessel's chief mate reviewed the stowage plan and approved it, and that he

checked the cargo lashings. However, to state that the vessel owner had assumed control of or had participated in cargo operations is a gross misstatement. The testimony of both the ship's master and the ship's chief officer was that their concern and authority regarding cargo stowage related only to matters affecting vessel navigational safety. Their testimony indicated that their responsibility extended only to making sure the cargo stowage was secure and did not render the vessel unseaworthy for its ocean voyage. Nothing in the testimony of the master or chief officer indicated that the ship's officers had any other authority or control with regard to cargo operations.

Furthermore, the M/V SAMMI HERALD was under time charter to Pioneer. Under the specific terms of the time charter, as is the custom under maritime law, Pioneer, the time charterer who "leased" the vessel's cargo carrying space, was responsible for the stowage of cargo and all cargo operations. In this regard, the evidence demonstrated that Borda Livre, a Brazilian contractor of Pioneer, prepared the stowage plan (which the ship's chief officer merely reviewed to assure navigational safety) and that Pioneer's Brazilian stevedores loaded the cargo. Likewise, in New Orleans, Cooper/T. Smith, an independent contractor stevedore hired by Pioneer, conducted all aspects of the cargo operations. Outside of concerns for navigational safety, the record does not support respondents' assertion that the vessel owner had any authority or control over any cargo operations.

C. The Vessel Owner's Purported Knowledge Concerning the Alleged Dangerous Condition of the Cargo Stow

Mr. and Mrs. Woods further assert throughout their opposition that the vessel owner, through the master, chief officer, and crew, knew that the condition of the cargo as loaded was unsafe and would pose a risk of harm to unloading longshoremen, yet did nothing to change the stowage or to intervene in the unloading process or to stop the discharge.

Undoubtedly, the vessel's master and chief officer knew that some pieces of the Houston pipe cargo overlapped some pieces of the New Orleans pipe cargo. However, nothing in the record indicates that the vessel owner, including the vessel's master, officers and crew, had any knowledge that this condition would pose any risk of danger to the discharging stevedore and his longshoremen. In fact, Mr. LaFrance, the stevedore superintendent in charge of this longshoring discharge operation, testified that he did not believe that the stow presented any unreasonable or unusual risk of harm to his experienced longshoremen. Indeed, absent such actual knowledge of danger, the shipowner had no duty under *Scindia* to intervene in the cargo operation. *See Scindia*, 451 U.S. at 166-69. How can a shipowner, who is not an expert in cargo operations, be expected to realize that a cargo stow is dangerous when the stevedore superintendent, the recognized expert in cargo discharge operations, testifies that he observed no condition that presented any particular danger? There simply is no evidence in the record indicating that petitioners Sammiline and Hightworth had any knowledge that the stowage condition in the No. 2 hold presented any unreasonable risk of danger to the longshoremen. Furthermore, the duty that a shipowner (who is not a cargo expert) owes to an "expert and experienced" stevedore and his longshoremen to correct such cargo hazards is exactly the issue presented for consideration by this writ application.

Also in this regard, Mr. and Mrs. Woods argue that the vessel's master testified that "it was his practice to leave for the next port of call even though he believed the cargo would be unsafe for a discharging stevedore." Writ Opposition, 2. This remark takes the master's testimony out of context. The testimony to which respondents refer

was addressed to a hypothetical question posed by respondents' counsel. Counsel for Mr. and Mrs. Woods asked the master: "Suppose that the manner in which the cargo is stowed by the stevedore does not present a hazard at sea, but will present a hazard to those who will discharge the cargo, will the captain, nevertheless, sail to the discharge port?" The vessel's foreign master, who testified through an interpreter, answered, "In that case, we sail." However, the master also qualified his statement by explaining that his authority was with regard to safety of the vessel in navigation, not safety with regard to stowage and discharge of cargo. In any event, the master testified that had he observed a condition on his vessel that he believed dangerous, he would have ordered it corrected (Record, Vol. 6, pp. 627-29). Again, the duty owed by the vessel owner (who is not an expert on cargo stowage and discharge operations) to the stevedore and his longshoremen (who are the cargo experts) to recognize and correct such a cargo hazard is the exact question presented here. Petitioners submit that this Court should grant a writ to decide this important question.

D. The Vessel's Purported Decision Regarding the Cargo Discharge Rotation

Mr. and Mrs. Woods assert that although the pipe cargo was stowed such that the Houston cargo should have been off-loaded first, the vessel owner together with the time charterer decided to sail to New Orleans first, and then decided not to unload the Houston cargo so as to render discharge of the New Orleans cargo safer. Respondents' argument is not supported by the record.

The M/V SAMMI HERALD was under time charter to Pioneer. As respondents well know and as the record clearly discloses, under the time charter the vessel was under orders from the time charterer as to which port it would first sail, and concerning when and how the cargo would be loaded and unloaded. There is no evidence in

the record indicating that petitioners (*i.e.*, the shipowner) could have ignored the charterer's orders and ordered the vessel to proceed to Houston first. Furthermore, there is no evidence in the record indicating that the vessel owner could have ordered the New Orleans stevedore (*i.e.*, a contractor of the time charterer) to unload the Houston cargo. The evidence is that the time charterer, not petitioners, had this authority. In any event, the suggestion that the Houston cargo should have been off-loaded was not made until after the fact—until preparation for trial—long after this accident occurred. There simply is no factual basis for respondents' contentions that petitioners had any control over the cargo discharge and port rotation decisions.

The factual assertions of Mr. and Mrs. Woods lack support in the record. The Fifth Circuit's opinion correctly recognized that the facts of this case are that petitioners did not hire, supervise, or direct cargo operations and undertook no duty in this regard. The question presented for this Court's review, upon which the Circuits are divided, is whether a shipowner assumes liability for injuries resulting from cargo stow under such circumstances.

II. THE THIRD CIRCUIT'S *DERR* DECISION DIRECTLY CONFLICTS WITH THE FIFTH CIRCUIT'S HOLDING; THIS COURT SHOULD GRANT A WRIT AND RESOLVE THE SUBSTANTIAL CONFLICT AMONG THE CIRCUITS REGARDING THE SHIPOWNER'S DUTY UNDER *SCINDIA*

Respondents do not deny that the Fifth Circuit held in this case that the shipowner has a duty imposed under *Scindia* to correct any dangerous condition in the cargo stow before turning the vessel over to the discharging stevedore. Likewise, respondents do not dispute that the Third Circuit in *Derr* reached the opposite conclusion. Nor do they deny that the rulings of the other circuits which have addressed the issue are in conflict.

Rather, they contend that this case differs from *Derr*. They assert that the vessel owner in this case did inspect and supervise the stowage of the cargo and knew of the dangerous condition, while the *Derr* decision did not address the question of the shipowner's knowledge concerning the condition of the cargo stow. Respondents' Opposition, p. 17.

First, as discussed above, respondents' purported factual distinction is without merit. As the Fifth Circuit's decision demonstrates, the record in this case does not support respondents' contention that the shipowner undertook inspection and supervision of the cargo stowage and discharge operations, or that the shipowner had any actual knowledge concerning any dangerous condition. Indeed, the Fifth Circuit, after thoroughly reviewing the record in light of the same factual accusations respondents make before this Court, based its decision on its conclusion that the time charterer and its contractors, not petitioners, controlled the cargo operations.

Second, the legal question addressed by the Fifth Circuit, is the same question addressed by the Third Circuit in *Derr*. In both cases, the courts addressed the issue whether a shipowner owes any duty to the discharging stevedore and his longshoremen under this Court's *Scindia* decision regarding the condition of the cargo stow as loaded by a stevedore in a foreign nation. Petitioners' Appendix, 9a-11a (873 F.2d at 847-49), 13a-18a (873 F.2d at 850-52); *Derr*, 835 F.2d at 493-95. Indeed, the Fifth Circuit expressly recognized that the *Derr* decision involved "remarkably similar circumstances" to the present case. Petitioners' Appendix, 9a (873 F.2d at 848). While the Fifth Circuit openly acknowledged that this case presented the same issue as addressed in *Derr*, it found itself bound to disagree with the *Derr* holding in light of its prior jurisprudence, which imposed such a duty on the shipowner. Petitioners' Appendix, 9a-11a (835 F.2d at 847-49), 13a-18a (835 F.2d at 850-52);

See also Petitioners' petition, 11-15. Clearly, a direct conflict exists between the holdings of these two courts, as well as among the other circuits that have addressed the issue. *See* Petitioners' petition, 13-15. This Court should grant a writ to address this substantial and important conflict among the circuits.

CONCLUSION

As discussed above and in petitioners' petition, this case presents questions of extreme importance to federal maritime personal injury and indemnity law upon which the circuits are in conflict. Respondents John and Beverly Woods have presented no valid reason for refusing to grant a writ. Petitioners respectfully submit that the Court should grant a writ of certiorari.

Respectfully submitted,

ROBERT H. MURPHY
KENNETH J. SERVAY *
JOHN H. CLEGG
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Petitioners

November 3, 1989

* Counsel of Record